Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

U.A. LOCAL 38 CONVALESCENT TRUST FUND, ESTATE OF JOSEPH P. MAZZOLA, and ARISTOCRAT HOTELS, INC.,
Petitioners,

VS.

CAROLE BRADEN, JUANITA RAYMOS, CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In a non-diversity case removed from California Superior Court, did the U.S. District Court abuse its discretion in failing to remand the case to state court after all federal claims and causes of action had been voluntarily dismissed, at which point, over a year before trial, the District Court's participation in the case had been insubstantial, but after which point the Court formed a class, ruled on dispositive motions and tried the case with a jury?

2. Did the U.S. District Court properly grant summary judgment of discriminatory and retaliatory non-rehiring under California Government Code 12940(f) to one who did not apply for rehiring? Was the District Court free at trial to retreat from his summary judgment ruling in this connection?

3. Did the U.S. District Court properly direct a verdict of gender discrimination under California Government Code 12940 where the record contained substantial evidence that the allegedly favored employees were better qualified than plaintiffs for the work in question?

4. Where the amount of lost wages damages found by the jury was several times greater than what the evidence would support, and there was reliable evidence that the verdict of lost wages and tips was made on the jury's assumption that all waitpersons underreport their tips, as to which assumption there was no evidence in the record, should the U.S. District Court have granted a new trial on the issue of lost wages damages?

5. In fixing attorney fees and costs of $619,700 in respect of the services of two young lawyers (2000 hours at $170 equals a lodestar of $340,000, enhanced by a multiplier of 1.75 for an additional $255,000, plus $16,200 for work on the fee application and $8,500 in costs, totalling $619,700), did the U.S. District Court abuse its discretion in:

   a. Denying petitioners' request for discovery of the fee agreement between plaintiffs and their counsel?

   b. Denying petitioners' request for discovery of plaintiffs' attorneys' original time records, and instead relying completely for the finding of hours-worked on recently pre-

pared hearsay summaries, in a case in which plaintiffs lost the verdict and judgment on substantial portions of their claims, including the class action and age discrimination?

6. Does the "no-enhancement" rule of *City of Burlington v. Dague* ____ U.S. ____, 112 S. Ct. 2638 (June 24, 1992) apply only where the right to fees is granted by a federal statute, or does it also apply in federal court when the right to fees is granted by a state statute?

List of Parties

Plaintiffs and Respondents	Defendants and Petitioners
Carole Braden	U.A. Local 38 Convalescent Trust Fund
Juanita Raymos	Estate of Joseph P. Mazzola
Christine Chrapowicz	Aristocrat Hotels, Inc.
Wanda Brooks	

Aristocrat Hotels, Inc. has no affiliates, parents or subsidiaries. It is a closely held Colorado corporation engaged in hotel management, with its principal place of business in San Francisco.

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B. *Discovery of Plaintiffs Counsel's Original Time Records.* For the guidance of parties in applications under fee shifting statutes, this Court should hold that original contemporaneous records of hours worked must at least be available for the opposing parties' inspection before the Court can consider recently prepared summaries of those records, expecially where the fee applicant has been unsuccessful in large parts of his case. 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners above-named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 24, 1992.

OPINION BELOW

The opinion contains a notation that disposition is not appropriate for publication. The opinion is reprinted in the appendix hereto, p. 1a, *infra*. The Order on Petition for Rehearing is included in the Appendix at p. 1b.

JURISDICTION

All four plaintiffs — Braden, Raymos, Chrapowicz, and Brooks — were waitresses at the Konocti Harbor Inn, a Lake County, California hotel and resort owned by petitioner UA Local 38

Plumbers and Pipefitters Convalescent Trust Fund. The four plaintiffs were all members of the Hotel, Motel and Restaurant Employees and Bartenders Union, Local 18. At all times pertinent hereto there was a collective bargaining agreement in effect between Local 18 and Konocti Harbor Inn.

In 1986 plaintiffs were denied continued employment in the Konocti Harbor Inn dining room. In 1987 three of the plaintiffs were not rehired at Konocti, and a fourth did not apply. Having pursued the administrative steps required by the California Fair Employment and Housing Act, California Gov't Code 12940 et seq., the plaintiffs filed the present case on November 17, 1987 in Lake County, California Superior Court. The complaint alleged violations of California's anti-employment discrimination statute but also alleged several causes of action — wrongful discharge in breach of plaintiffs' contractual rights, breach of implied covenant of good faith and fair dealing, discharge in violation of public policy, negligent infliction of emotional distress — which required interpretation of the collective bargaining agreement between Local 18 and Konocti Harbor Inn. These petitioners therefore removed this case to the Federal District Court in San Francisco under 28 U.S.C. 1441(a), on the ground that the above-referenced causes of action implicating the collective bargaining agreement were within the original jurisdiction of the federal district courts under 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). After jury trial in federal court, the U.S. District Court entered judgments totalling $311,949, apportioned among the four waitresses. After a hearing on attorney fees, the Court awarded plaintiffs $619,700 in fees and costs, costs representing only $8,500 of that total. Petitioners appealed to the Ninth Circuit, which affirmed on June 24, 1992. A petition for rehearing was denied on August 21, 1992.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

California Fair Employment and Housing Act, Government Code Section 12940

Sec. 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practices; exceptions

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to the employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or terms, conditions or privileges of employment.
>
> * * *
>
> (f) For an employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

California Government Code Section 12965(b)

* * *

In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs.

STATEMENT OF THE CASE

For years the four plaintiffs had worked as waitresses at Konocti Harbor Inn. Konocti usually closed in the winters. In the spring the plaintiffs would work in the coffee shop. When business picked up, the dining room would open and they worked in there. In the fall the dining room closed and the plaintiffs would return to the coffee shop until the resort closed.

The dining room served standard American fare. Food was prepared in the kitchen and there put on the customer's plate. There was no tableside preparation of food.

The dining room always lost money. In 1986 Konocti management decided to remodel the dining room and to change the menu and wine list completely. The new menu, in Italian with translations, contained some 40 items of Northern Italian cuisine and was the same as that which had had some success in a Palm Springs, California restaurant called the Marquis. Konocti hired the head chef from the Marquis, one Pirro, and Pirro brought with him to Konocti a maitre'd and waiter who had worked at the Marquis. They then proceeded to hire Italian waiters from San Francisco and Los Angeles to round out the staff. All of them were males.

In May of 1986 Konocti management told the four plaintiffs there was not enough time to train them in the new menu, which required tableside preparation of almost all items, including preparation of sauces. Konocti management told plaintiffs they could work in the coffee shop in the 1986 season. Three of them did that, and the other, Braden, left Konocti to work elsewhere.

In June of 1986 three of the plaintiffs — all but Braden — filed complaints with the California Department of Fair Employment and Housing. Konocti and Mazzola, who until his death in August of 1989 had been the head of Local 38 for 30 years, were named as respondents. In 1987, when these three women reapplied for work at Konocti, they were turned down. Braden did not file a DFEH complaint in 1986 and did not apply for work at Konocti in 1987.

Turned down at Konocti in the spring of 1987, the three women found work elsewhere. In August of 1987, Henri Lewin, whose company, Petitioner Aristocrat Hotels, Inc. had a management contract at Konocti in 1987 and 1988, offered all four women their jobs in the dining room back, the Italian cuisine policy having been abandoned after 1986. Raymos and Chrapowicz chose not to come back to Konocti. Braden and Brooks returned to work there in 1988 and 1989 before quitting.

In 1986 working in the coffee shop at Konocti, Raymos, Chrapowicz and Brooks made as much or more money in wages and tips than did most of the waiters working in the dining room in 1986. In 1986 working in the coffee shop Raymos made more money than she had made in 1985 working in the dining room. The 1987 wages and tips of plaintiffs from employment in other restaurants were only slightly less than wages and tips of waitpersons working in the Konocti dining room in that year. Plaintiffs' lost wages and tips damages were not great.

After Braden filed a DFEH complaint in September of 1987 and obtained a right-to-sue letter, this case was filed in Lake County Superior Court in November of 1987.

There is no diversity jurisdiction in this case, all parties being citizens of California.

After removal to federal court, plaintiffs filed a First Amended Complaint, seeking to delete all causes of action which conferred federal jurisdiction under section 301(a) of the Labor Management Relations Act. They so informed the District Court on their motion for remand, which was opposed by these Petitioners. The Court denied remand. Plaintiffs then filed a Second Amended Complaint, adding a 301(a) cause of action against their union, Local 18, for breach of duty of fair representation. They also inserted in their basic Cal. Gov't Code 12940 discrimination cause of action an allegation that defendants had violated the collective bargaining agreement. Nothing ever came of the allegations pertaining to the collective bargaining agreement. The collective bargaining agreement contained a grievance procedure which plaintiffs never pursued.

On June 8, 1988 this Court decided *Lingle v. Norge* 486 U.S. 399, 108 S.Ct. 1877 (1988), holding that the assertion of non-waivable statutory rights is not the basis of 301(a) jurisdiction, even though the same facts which show infringement of those rights might also show breach of a collective bargaining agreement. Shortly thereafter, in October of 1988, plaintiffs announced that they had settled with Local 18. This left in the case only California Government Code claims. Trial was still a year and a half away.

In March of 1989 plaintiffs moved for certification of a class. The Court certified a class of all present and former female employees of Konocti. Notice was sent to the class members and a class of about 350 women was closed. On the trial the jury found in favor of defendants on the issue of class-wide discrimination, the evidence clearly demonstrating substantial representation of women in all seventeen departments of Konocti, the 1986 dining room waiter crew being the lone exception.

In November of 1989 plaintiffs moved for summary judgment on the issues of 1986 discrimination and 1987 retaliation for the DFEH filings. Judge Legge denied the motion on the first ground, later changing his mind and directing a verdict on that issue for plaintiffs at trial. On the second matter, 1987 non-rehiring of the plaintiffs who in June of 1986 had filed DFEH complaints, these petitioners filed no opposition and the motion was granted. It was also granted, however, over Petitioners' opposition, as to Braden, who had neither filed a DFEH complaint in 1986 nor applied for work at Konocti in 1987.

Jury trial started in June of 1990. There was received in evidence without objection and without qualification plaintiffs' Exhibit 15. This was Konocti's 13 page agency response to the three plaintiffs' 1986 DFEH complaints. It set forth the reasons why in managment's opinion the 1986 dining room waiters were better qualified than each of the plaintiffs to serve the 1986 menu. At trial Ted Hudson, a 1985 dining room waiter who was retained in the dining room in 1986, testified that he had operated his own Italian restaurant for several years, that tableside preparation of the items on the 1986 menu required years of experience, that serving the 1986 menu required skills and knowledge not required

for serving the 1985 menu, and that one of plaintiffs, Wanda Brooks, needed training in the use of a tableside cooking device known as a gueridon. Another 1986 dining room waiter, Di Pietro, testified that he attended a hotel and restaurant school in Italy for three years, and worked in restaurants there for ten years, before coming to the United States. Judge Legge curtailed evidence from Di Pietro concerning specific examples of tableside preparation of sauces and other tableside blending of ingredients, having already announced without a motion from plaintiffs that he intended to direct a verdict for plaintiffs on the issue of discrimination. Di Pietro testified that he worked with plaintiffs in the dining room when the place was crowded, that then there was no tableside preparation, that in his opinion plantiffs were not qualified to serve the 1986 menu and that there was not enough time to train them for the 1986 season. A waitress at Konocti, Marjorie Wright, testified that in her opinion it would take a month and one half to two months to learn how to serve the 1986 menu.

The trial judge instructed the jury to find against Konocti and Aristocrat and in favor of all four plaintiffs on the only two liability issues in the case: 1986 discrimination and post-1986 discriminatory non-rehiring and retaliation. While these defendants conceded liability for 1987 post-DFEH complaint non-rehiring of three plaintiffs, and that condition prevailed only from April of 1987 until the three plaintiffs were offered their jobs back in August of 1987, all other matters as to which Judge Legge directed a verdict were contested and presented issues for the jury.

Chief among these was the Court's instruction that defendants illegally retaliated against Carole Braden in 1987, when Braden did not even reapply for employment in that year.

The jury was asked to find whether Mazzola had participated in the violations which the Court directed the jury to find, and the jury found that he did.

Ted Hudson was the top wage and tip earner in the Konocti dining room in 1986 and 1987, reporting a total of only $16,700 for both years. Juanita Raymos reported wages and tips of $13,050 in those two years. Yet the jury awarded Raymos $13,200

for lost wages and tips in those two years. It did this by adding to the difference between Hudon's and Raymos' 1986-1987 earnings an amount equal to 15% of the dining room gross receipts for those years (the 15% equaled $60,300) and giving Raymos 16% of that $60,300, i.e. $9,650. This latter calculation has no bearing on Raymos' losses of wages and tips. As appears, in Raymos' case it resulted in an illegal enhancement of $9,650. Chrapowicz made $14,200 in wages and tips in 1986 and 1987, against Hudson's $16,700 but the jury enhanced her damages of $2,500 by awarding her 32% of the $60,300, an additional $19,300. The enhancement which the jury awarded to Brooks for 1986-87 was the same $9,650 which it awarded to Raymos, but in Braden's case the enhancement was $21,700 for those two years, i.e. the jury awarded Braden 36% of the $60,300 amount.

Braden and Brooks worked at Konocti in 1988 and 1989 but contended they were discriminated against in those years, in the matter of work assignment, due to their prior DFEH complaints. The trial judge over the competent countervailing evidence of Marjorie Wright, who was Brooks' and Braden's supervisor, instructed the jury so to find. The best dining room wage and tip earner in 1988 was Robert Susumilch and in 1989 Bonnie Crummer. Their combined wages and tips for those two seasons were about $22,000. Brooks' reported 1988 and 1989 earnings were $11,150. Instead of allowing as lost wages and tips for those two years only the difference of $10,850, the jury enhanced the $10,850 by $9,690, being total dining room gross times 15% (which in 1988-89 was $53,840) times 18%, which the jury believed Brooks would have received. Finally, in 1988 and 1989 Braden reported $17,540 in wages and tips compared to the top earnings of $22,000. Her true damages for loss of wages and tips were $4,460. To this the jury added $11,843, being 22% of the 1988-89 amount of $53,840.

The enhanced wage loss figures were brought to the attention of the trial judge on motion for new trial, but he declined to grant any remittitur or other relief. The Court entered judgment for plaintiffs in the total amount of $311,949. The judgment included $35,000 to each plaintiff for emotional distress and a $50,000 punitive damage award against Konocti.

Plaintiffs then moved for attorney fees, seeking the sum of $841,305.15. The $841,305.15 included a lodestar of $394,441, enhancement of 1.1 (i.e. an additional $433,885.10) and fee motion hours of $12,979.05. Submitted with the application were two recently prepared summaries showing the hours of plaintiffs' two lawyers from the beginning of the case. No data supporting the summaries was submitted, although both lawyers submitted declarations indicating they maintained contemporaneous time records. The summaries manifestly were made from some record. The fee agreement between plaintiffs and their counsel was not produced on the motion for fees. All we know about the fee agreement is what can be gleaned from plaintiffs' memorandum on the fee motion ("Ms. Sher, joined by Ms. Dietrich . . . agreed to represent them on a contingent basis in a lawsuit challenging defendants practices. Other than a nominal initial sum, ($450 each), the plaintiffs were unable to afford to pay any legal fees to Ms. Dietrich or Ms. Sher or even to reimburse them for costs." Memorandum in Support of Motion for Fees, Nov. 12, 1991, p. 4.

Soon after receiving the fee motion defense counsel contacted Mr. Pearl, who is special counsel who joined the case for the fee applications. Defendants suggested to Pearl the dates of December 6 and 7, 1991 for the deposition of Sher and Dietrich, plaintiffs' attorneys. Pearl said he would get back but had not done so by the time it was necessary for defendants to respond in writing to the fee motion. Defendants' response included a request that the Court stay its hand on the fee application pending reasonable discovery. Specifically defendants sought discovery of the fee agreement between plaintiffs and their counsel and plaintiffs' counsel's original time records. Several attempts to reach Pearl by phone were unsuccessful. In a declaration filed December 7, 1990, Pearl stated plaintiffs counsel declined to be deposed. Defendants therefore served a subpoena duces tecum requesting the fee agreement and the records underlying the hours summaries. Pearl wrote back on December 10, 1991 that plaintiffs' attorneys would ignore the subpoenas.

The fee hearing was held on December 14, 1991. It lasted about twenty minutes. Defendants asked the Court to stay his

hand pending the specifically defined discovery defendants had requested.

The trial court denied the request for original time records and the fee agreement. He proceeded solely on the basis of the hours summaries to find 2,000 compensable hours. The hourly rate was fixed at $170. Expressly relying on the now disapproved case of *Fadhl v. City and County of San Francisco* 859 F.2d 649, the Court enhanced the lodestar by a multiplier of 1.75. This created additional fees of $255,000. The Court added compensation for the fee application effort in the amount of $16,200 and $8,500 in costs, for total fees and costs of $619,700. The trial court denied a subsequent motion to alter or amend the fee award.

On appeal the Ninth Circuit affirmed in all respects. Both in the trial court and in the Ninth Circuit defendants strenuously objected to any enhancement of the lodestar, relying on Justice White's opinion in *Pennsylvania v. Delaware Valley Citizens Council* 483 U.S. 711 (1987). The Ninth Circuit's unpublished opinion did not deal with the enhancement issue. That opinion was rendered on the same day this Court decided the *Dague* case. Petitioners filed a rehearing petition based on *Dague* in the Ninth Circuit, but that petiton was summarily denied.

REASONS FOR GRANTING THE WRIT

I. Pendent Jurisdiction

If this case was free of reversible error Petitioners would not at this post-judgment stage ask the Court to dismiss or remand on the ground that the District Court abused its discretion in choosing to exercise pendent jurisdiction of the state law claims when all federal claims had been voluntarily dismissed and the case was still in its early stage. But the direction of a verdict on the discrimination issue in this case was reversible error, as Petitioners are attempting to show herein. That being so, there is no unfairness to plaintiffs, no estoppel of defendants, to assert that the judgment should be vacated also on the jurisdictional ground and the case remanded to state court.

This Court's opinion in *Carnegie-Mellon Univ. vs. Cohill* 484 U.S. 343 (1988) opens the door to remandment of this case to state court. This Court should adhere to a policy of letting the state courts decide state law causes of action, unless there is a very good reason why a federal court should decide state law issues among citizens of the same state. In the case at bar there is no such good reason, or in fact any reason at all, why Judge Legge should have continued to exercise pendent jurisdiction of the Cal. Gov't. Code 12940 claims after the last federal claim was voluntarily dismissed in October of 1988, but there are many good reasons why at that point he should sua sponte have remanded the action. Among these reasons are comity, the crowded federal docket, and the avoidance of *Erie* problems. The new Supplemental Jurisdiction statute (Judicial Improvements Act of 1990 (Pub. L. 101-650) 28 U.S.C. 1367, does not apply in cases filed before December 1, 1990. However, all of the reasons for declining jurisdiction listed in subsection (c) of that statute are present in the case at bar.

II. Interlocutory Summary Judgment

This Court's opinion in *Celotex Corp. vs. Catrett* 477 U.S. 317 (1986) emphasizes the importance of summary judgment in relieving the District Courts of unnecessary trial time. At oral argument of this case in the Ninth Circuit, the Court seemed to adopt a position that once summary judgment has been rendered there is no mandatory duty for the trial judge to change it, even if the summary judgment order is non-dispositive, even if evidence at trial shows the summary judgment order was wrong. Petitioners urge this Court to repudiate that view. Trial by affidavit at early stages of a case before the evidence is fully developed can lead to the wrong result. In the case at bar Judge Legge held on summary judgment, and on that basis instructed the jury, that petitioners had unlawfully retaliated against Carole Braden in 1987. 1987 was the year the other three plaintiffs were turned down in their request for employment at Konocti. But Carole Braden quit Konocti in May of 1986, when the new dining room policy was announced, and she worked elsewhere through 1986 and 1987, not applying to Konocti in 1987. Except one banquet job near the end of 1987, there were no relations between Braden and Konocti

in 1987. These matters were brought to Judge Legge's attention at the November 17, 1989 hearing on summary judgment and in written submissions on the settlement of the summary judgment order. Nevertheless, the jury was instructed, on the basis of the summary judgment order, that Konocti and Aristocrat had unlawfully retaliated against Braden in 1987. This Court should reaffirm the principle of Rule 54(b) of the Federal Rules of Civil Procedure, that a non-dispositive summary judgment order is subject to revision at any time before final judgment, and that such orders should be revised when the evidence indicates they are wrong.

III. Proof of Discrimination

The directed verdict on discrimination in this case was in error. The jury reasonably could have found that the four waitress plaintiffs were excluded from the Konocti dining room in 1986 not because they are women, but because management believed they were less qualified to serve the 1986 menu than the seven waiters, all but two of them Italian-speaking, and *all* of them with extensive prior experience in tableside preparation of Italian dishes, who did work in the dining room in 1986. This Court should reaffirm the principles and procedure of *Mc Donnell Douglas Corporation vs. Green* 411 U.S. 792 (1973) and *Texas vs. Burdine* 450 U.S. 257 (1981). It is true that these plaintiffs offered evidence in the case at bar to the effect that they were qualified to do the tableside preparation required by the 1986 menu. But their evidence did not rise to the level of a directed verdict. There was ample countervailing evidence (e.g. plaintiff's Exhibit 15) indicating that Konocti management in good faith believed that plaintiffs were not qualified to serve the 1986 menu, that there was not enough time before the 1986 season to train them in those qualifications, and that the waiters actually hired were better qualified to serve the 1986 menu than plaintiffs were. The directed verdict on discrimination in this case was error. Viewing the evidence in the light most favorable to Petitioners, *Continental Ore vs. Union Carbide* 370 U.S. 690, fn. 6 (1962), it is clear that the directed verdict on discrimination must be reversed. This Court should grant the writ in order to reaffirm the salutory principle that discrimination is an issue of fact to be resolved by the factfinder on all the relevant evidence. The

California Courts do not hold otherwise, *Stephens vs. Coldwell Banker* 199 Cal.App.3d 1394, 1401. In federal Court the *Mc Donnell Douglas* rules for proof of discrimination must govern the proceedings.

IV. New Trial

This Court should reaffirm the centuries-old rule that a trial judge must set aside excessive damages or damages not supported by the evidence. In our case it was proper for the jury to fix damages of lost wages by taking for 1986 and 1987 what the highest earning waitperson earned and deducting therefrom the actual earnings of the plaintiffs. But such earnings, both for plaintiffs and the highest-earners, already included both wages and tips. When the jury went further, under the rubric of lost earnings, and applied 15% to the restaurant grosses and distributed that 15% among plaintiffs, the jury was outside the evidence and was also compensating plaintiffs twice for the same loss. Plaintiffs, not these Petitioners, put before the trial judge the evidence of precisely how the jury calculated damages. On motion for new trial, the trial court could and should have reduced the verdict by eliminating the illegal enhancements, offering plaintiffs the option of a reduced judgment or a complete new trial on damages.

V. Attorney Fees

A. Discovery of the Fee Agreement Between Plaintiffs and Their Counsel

In *City of Riverside vs. Rivera*, 477 U.S. 561, this Court held that a reasonable attorney fee need not be proportionate to the amount of damages recovered. In *Blanchard v. Bergeron* 489 U.S. 87 (1989) this Court held that a contingent fee agreement does not impose a limit on fees available under 42 USC 1988. *Blanchard* did say that the fee agreement is one of the factors which the Court might consider in arriving at a proper fee. In *Vanegas vs. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679 (1990) this Court held that the fact of lower court-awarded fees does not prevent an attorney from recovering against his client a higher contingent fee provided for in their agreement.

It seems quite clear that in fixing a statutory fee we start with the lodestar, being productive hours times reasonable rate. The question which the present care presents is whether there are any circumstances under which the terms of the fee agreement would cause the trial court to reduce the lodestar amount. Petitioners believe there are such circumstances. Respondents below took the position, citing *Vanegas vs. Mitchell*, 495 U.S. 82 (1990), that no matter what the fee agreement says, it will not affect the amount of the award. The lower courts agreed: "What we are concerned with here is an adequate award of attorneys fees to the defendants, not a question of how the money might be shared between plaintiffs and their counsel." (Dkt. No. 370, E.R. 14:22-25). (Remarks of the trial judge.)

There are injunctive relief cases and there are damages cases. The case at bar is purely a damage case, all claims for injunctive or monetary relief having long since been abandoned. There are class actions, which usually involve no fee agreements, and there are individual plaintiff cases, where written fee agreements are common, if not required by law. The case at bar had both of these aspects, but we are dealing here with the private plaintiff aspect.

Cal. Gov't. Code § 12965(b) provides for an award to the party, not to his attorney. When the attorney and party contract, the attorney presumably has advised the client of the possibility of court-awarded fees against the defendant. The Courts should enforce the fee agreement between the attorney and client, and should not make a new contract for the plaintiff and his attorney. *Vanegas vs. Mitchell, supra.* In fixing fees under a fee shifting statute a court is trying to decide how much money a losing defendant should pay to a victorious plaintiff, not to the plaintiff's lawyer. In so doing the court should be guided by the objective of making sure that poor clients with good cases get good representation and the objective of providing compensation to the attorney for his successful work. To do this the Court must look at the fee agreement to see how much of the potential recovery of damages and fees the client has agreed to pay the lawyer, and what provisions have been made for costs. If the lawyer is to share in the damage recovery and also take all of the court-awarded fee, the lodestar should be reduced. If the parties have agreed that the

client will keep all damages and the attorney will receive the court-awarded fee, a fee equal to the lodestar should be awarded. If the agreement makes no distinction between damages and a fee award, and provides merely for a percentage fee, the Court should award a statutory fee only if the lawyer's contingency fee is less than the lodestar. In other words, the trial court should fix the lodestar and award the same, unless the fee agreement indicates the lawyer will wind up with more than the lodestar, in which case the lodestar should be reduced so that the lawyer's share of the damage recovery and the reduced lodestar equal the original lodestar. This would reduce the amount of fees payable by defendants, who after all are already paying the damage judgment.

In the case at bar plaintiffs recovered damages of $311,949. How much of this have they agreed to pay their attorneys? That we do not know, because the court at plaintiffs' instance denied discovery of the fee agreement. If these four plaintiffs have agreed to pay a third, quarter, or 40% of their damages to their lawyers, plaintiffs should be held to that agreement and the lodestar payable by these Petitioners should be reduced by the amount of the contingent fee. In this way the fee agreement may indicate that reduction of the lodestar is proper. It is idle to speculate on what might be the terms of the fee agreement between Braden et al. and their attorneys in this case. We do not know what those terms are, but those terms may affect the amount of the fees payable by Petitioners. See *Sullivan vs. Crown Paper Board Co.* 719 F.2d 667, 668-669 (3rd Cir. 1983), where the Court remanded for ascertainment of the contingent fee agreement's terms.

The fee-shifting statutes do not say that plaintiffs should be relieved of their contractual obligations to their lawyers. It is not the purpose of the typical fee-shifting statute providing for "a reasonable fee" to relieve the plaintiff of any charges for fees and cause legal services to be free of charge if plaintiff wins. The purpose of such statutes is to get plaintiff a lawyer and adequately compensate the lawyer for his successful work. These objectives are well served by fixing fees in the light of the fee agreement.

In *National Ass'n. of Concerned Veterans vs. Sec. of Defense* 675 F.2d 1319 (D.C. Cir. 1982) at p. 1328, the Court stated: "The initial inquiry therefore in determining whether a premium for risk should be awarded must focus on the terms of any agreement between the applicant and his counsel relating to fees. The better practice would be for the applicant to include a copy of any such agreement in the fee application. In any event, the applicant should state whether any fee agreement exists and recite its precise terms."

In *Pennsylvania vs. Delaware Valley Citizens Council* 483 U.S. 711, (1987), this Court stated that the fee agreement may have a bearing on the question of enhancement of the lodestar, since the lawyer may have offset the risk of loss by negotiating a contingency which, if it materializes, would produce compensation greater than the prospective lodestar amount. For these reasons this Court should vacate the fee award and direct plaintiffs to produce their fee agreement in this case.

V. Attorney Fees

B. Discovery of Plaintiffs' Counsel's Original Time Records

Plaintiffs' victory in this case was not complete. Plaintiffs lost the verdict and judgment on their class action allegations and on their age discrimination claims. Under *Hensley vs. Eckerhart* 461 U.S. 424 (1981) plaintiffs are not entitled to compensation for the hours devoted to these two matters. A great deal of plaintiff counsel's time was devoted to the class action aspects of this case.

Petitioners cannot say what plaintiffs counsel's original time records would show because petitioners have never seen those records. In declarations in the District Court both of plaintiffs' attorneys stated they maintained contemporaneous time records.

The document which the District Court relied on completely in fixing hours was not an original record. It was a recently prepared summary, apparently from original records. The general rule of evidence in that summaries are not admissible unless the underlying documents they summarize are available to the party against whom the summaries are offered. Federal Rules of Evidence, Rule 1006, 4 Wigmore on Evidence, ¶ 1230.

Attorneys who anticipate making fee applications should keep accurate and current records of work done and time spent. *National Ass'n. of Concerned Veterans vs. Sec. of Defense,* supra, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

Such records should be produced to the Court and opposing counsel as a matter of course on fee applications.

The entries on the summaries produced in this case are elliptical and sometimes unintelligible. For this reason Petitioners asked to depose plaintiffs' attorneys, not for the purpose of embarrassing them, but for the purpose of arriving at a just conclusion as to the number of hours properly chargeable to Petitioners in this case. The District Court accepted plaintiffs' summaries almost entirely, reducing them by only 12% in arriving at a figure of 2,000 hours. Petitioners think that a careful review of the original records and specific deposition examination of plaintiffs' counsel will show that the number of compensable hours in this case is closer to 1,000 than to 2,000. Again, in *Nat. Ass'n. of Concerned Vets vs. Sec. of Defense* 675 F.2d 1319, 1334 (D.C. Cir. 1982) the Court held that specific discovery should have been permitted to test the accuracy of plaintiffs' fee application.

The District Courts have the power to circumscribe the subject matter and length of depositions. Taking depositions does not entail an evidentiary hearing. The results of the depositions may be put before the Court in written form in the fee motion procedure.

VI. This Court should grant the Writ and Decide Whether the Rule of *City of Burlington v. Dague* ____ U.S. ____, 112 S.Ct. 2638 (June 24, 1992) Applies to Fee Awards in Federal Court Where the Right to Fees is Granted by a State Statute

In *Ackerman vs. Western Electric Co., Inc.* 643 F.Supp. 836, 857-868 (N.D. Cal. 1986), Judge Schwarzer considered whether state or federal law should control the calculation of the amount of fees in federal court under Cal. Gov't Code 12965(b). He there pointed out conflicts among the circuits on this issue, and the fact

that there is no definitive law on the subject. In *Ackerman*, Judge Schwarzer, relying on *Blum vs. Stensen* 465 U.S. 886, 895 (1984), declined to enhance the lodestar. He noted that the California Agency charged with administering the Fair Employment and Housing Act had not followed *Blum vs. Stensen*, supra, in the matter of enhancement *DFEH vs. Cairo* (1984) FEHC Sec. No. 84-04 at p. 25 note 8. To the similar effect are *Serrano vs. Unruh* 32 Cal.3d 621, 639 fn. 29 (1982) and *Sundance vs. Municipal Court* 192 Cal.App.2d 269, 274 (1987).

This Court should grant certiorari and extend the salutary rule of *Dague* to all fee application in federal court, including fee applications based on state statutes. The federal courts must have the last word on compensation of attorneys for the performance of services in federal court. Also, the *Dague* arguments against enhancement, such as double counting, encouragement of fee litigation, rewarding the weakest cases and punishing the best defenses, immoderate fees, do not necessarily refer to the intent of Congress, and these objections have equal force whether enhancement is sought under a federal statute or a state statute.

It is clear that Judge Legge did not have the benefit of *Dague* when he added $255,000 to the fee award in this case. He did expressly rely on the Ninth Circuit's opinion in *Fadhl vs. City and County of San Francisco* 859 F.2d 614 (9th Cir. 1988), which *Dague* effectively overruled. Even if *Dague* is not controlling here, the trial court should be given the opportunity to reconsider the enhancement issue in the light of *Dague*.

VII. Conclusion

On the merits of this case there are four judgments, one for each plaintiff. A subsequent single judgment for attorney fees was entered in favor of the four plaintiffs. Petitioners ask the Court to grant the writ of certiorari, determine that the directed verdict for plaintiffs on discrimination and the summary judgment order in favor of Braden were error, vacate all judgments favorable to plaintiffs, and remand the case to the District Court, with instructions to remand the case to state court, or, alternatively, instructions to grant Petitioners a new trial. The fee judgment should be vacated and the case remanded to the District Court with instructions to permit discovery of the fee agreement and original time records and to permit reasonable deposition cross-examination of those writings. This Court should hold that *Dague* precludes enhancement of attorney fee awards in federal court.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16634
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn
Defendant-Appellant

No. 90-16635
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn
Defendant

and

ARISTOCRAT HOTELS, INC.
Defendant-Appellant

No. 90-16637
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn
Defendant

and

JOSEPH MAZZOLA
Defendant-Appellant

No. 91-15457
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn;
JOSEPH MAZZOLA;
ARISTOCRAT HOTELS, INC.
Defendants-Appellants

No. 91-16152
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellants,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn;
JOSEPH P. MAZZOLA;
ARISTOCRAT HOTELS, INC.
Defendants-Appellees

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted January 17, 1992
San Francisco, California

BEFORE: CHAMBERS, TANG and PREGERSON Circuit Judges.

This is a sex discrimination and retaliation case filed under Cal. Govt. Code ¶ 12940 based on Konocti Harbor Inn's policy of hiring only male waiters for the 1986 summer season. The Konocti Harbor Inn ("KHI") is a resort complex in rural Lake County, in Northern California. It is owned and operated by the Convalescent Trust Fund ("Trust Fund") of U.A. Local 38 of the Plumbing and Pipefitting Industry. Joseph P. Mazzola was the leader of Local 38.[1] Aristocrat Hotels, Inc. ("Aristocrat") man-

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1]Mazzola died on August 12, 1989. In January 1990, the plaintiffs substituted the Estate of Mazzola as a party-defendant.

aged KHI from March 1987 through the 1988 season. Plaintiffs are four women, Carole Braden, Juanita Raymos, Christine Chrapowicz and Wanda Brooks, who had worked at KHI prior to 1986.

In November 1989, the district court granted summary judgment in favor of the plaintiffs and against the Trust Fund and Aristocrat on the issue of retaliation. The jury trial commenced in June 1990. Prior to submitting the case to the jury, the district court granted the plaintiffs' motion for a directed verdict on the issue of the Trust Fund's and Aristocrat's liability for unlawful sex discrimination. The jury subsequently returned a verdict in favor of the plaintiffs and against Mazzola, finding that Mazzola had discriminated against the plaintiffs on the basis of their sex. The district court denied the defendants' motions for Judgment Notwithstanding the Verdict and New Trial. The district court then awarded attorneys' fees to the plaintiffs.

We affirm the district court in all aspects.

Jurisdiction. Defendants assert that the district court should have remanded this case to the state court once the plaintiffs voluntarily dismissed their federal claims. The judgment of the district court "ought not be lightly disturbed." *Schneider v. TRW, Inc.,* 938 F.2d 986, 994 (9th Cir. 1991). *See also Schultz v. Sundberg,* 759 F.2d 714, 718 (9th Cir. 1985). Given the time and judicial resources already invested in the case, the district court did not abuse its discretion by retaining jurisdiction over the case.

Sufficiency of Notice of Death upon the Record: Defendants put the notice of death of Mazzola on the very last page of the Defendants' Supplemental Responses to Plaintiffs' Fourth Set of Requests to Admit, Interrogatories and Request for Production of Documents. Defendants contend this constitutes sufficient suggestion of death under Fed. R. Civ. P. 25(a) and therefore, Plaintiffs failed to file before the statute of limitations expired.

The Ninth Circuit has not addressed this issue of sufficiency of notice. However, the Tenth Circuit has found that the "running of the ninety-day limitations period under Rule 25(a)(1) is not triggered unless a formal suggestion of death is made on the record, regardless of whether the parties have knowledge of a

party's death." *Grandbouche v. Lovell,* 913 F.2d 835, 836 (10th Cir. 1990) (per curiam). We adopt that rule and find that no formal suggestion of death was made on the record and therefore the statue of limitations had not run.

Admission of California Department of Employment and Fair Housing ("CDEFH") Right-to-Sue Letter: Defendants argue that plaintiff Braden's CDEFH complaint was not filed within the one year limitation. However, at trial the district court admitted into evidence the CDEFH right to sue letter which indicated on its face that her complaint was timely filed. At trial Braden testified that she filed with the CDEFH in 1986 and that the wrong violation date on her 1987 CDEFH complaint was an innocent mistake. The district court was in the best position to judge credibility. We affirm the district court.

Summary Judgment on Retaliation: "Ordinarily, summary judgment should not be granted when there are relevant facts remaining to be discovered, but the party seeking discovery bears the burden of shoiwing what specific facts it hopes to discover that will raise an issue of material fact." *Harris v. Duty Free Shoppers Ltd. Partnership,* 940 F.2d 1272, 1276 (9th Cir. 1991) (citing *Continental Maritime v. Pacific Coast Metal Trades Dist. Council,* 817 F.2d 1391, 1395 (9th Cir. 1987)). The summary judgment motion on the issue of retaliation was granted against the Trust Fund and Aristocrat in November 1989, seven months before trial. Defendants argue there was sufficient evidence to defeat a summary judgment motion.

At the time of the summary judgment motion, the court had declarations about the rejected job applications; declarations that others had been hired in place of the plaintiffs; an affidavit reporting a direct assault on plaintiff Brooks; and affidavits describing the lack of adequate work hours given to those rehired in 1988 and 1989. The defendants offered no opposing affidavits nor any excuse for failure to do so. Even the district court commented that the summary judgment was granted "because the defendants had not adequately responded to discovery and did not make a legally adequate defense to the partial summary judgment motion at the time it was filed." We affirm the district court's grant of summary judgment.

Directed Verdict on Sex Discrimination: The Ninth Circuit reviews a directed verdict under the same standard applied by the district court; such a verdict is proper if, considered in the light most favorable to the non-moving party, the evidence permits only one reasonable conclusion. *Peterson v. Kennedy,* 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied,* 475 U.S. 1122 (1986). Further, to benefit from favorable inferences, the party opposing the directed verdict "must present 'substantial evidence' in support of its claims." *Feldman v. Simkins Industries, Inc.,* 679 F.2d 1299, 1303 (9th Cir. 1982). The district court directed a verdict against defendants on the issue of sex discrimination because a prima facie case had been established and the defendants failed adequately to answer or rebut the plaintiffs' evidence. We affirm the district court.

Jury Verdict on Damage Awards: The standard for reviewing jury verdicts is whether they are supported by "substantial evidence," that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Oltz v. St. Peter's Community Hospital,* 861 F.2d 1440, 1450 (9th Cir. 1988).

Because of the variety of evidence, including tax records, tip records, and gross income of the dining room, the district court, who had viewed the trial in its entirety, found the jury damage awards reasonable. We cannot disagree.

Denial of JNOV: We review de novo the district court's denial of a motion for JNOV. *Wilcox v. First Interstate Bank, N.A.,* 815 F.2d 522, 524-25 (9th Cir. 1987). JNOV is appropriate only when the evidence, viewed in the light most favorable to the non-moving party, could not reasonably support the verdict. *Locricchio v. Legal Services Corp.,* 833 F.2d 1352, 1356 (9th Cir. 1987). Defendants did not place sufficient evidence in the record to uphold their contentions about Aristocrat. On the other hand, there was sufficient evidence on the record to permit a reasonable jury to find that Aristocrat was in charge of the daily management of KHI. We affirm the district court's denial of the JNOV.

Attorneys' Fees: Attorney fee awards are at the discretion of the trial court and are reviewed for abuse of discretion. Cal. Govt. Code § 12965(b).

In order to avoid turning the attorney fee proceedings into a second trial, the district court was well within its discretion to deny defendants discovery of plaintiffs' attorneys' time records. Further, the district court was in the best position to judge the reasonableness of the awards. Based on its knowledge of the case, the district court reduced the amount of hours claimed by plaintiffs and reduced the lodestar amount.

Defendants claim that the district court abused its discretion because it did not consider the contingency fee arrangement the plaintiffs' attorneys had with the plaintiffs. However, review of contingency fee arrangements is not mandatory. *See Blanchard v. Bergeron*, 489 U.S. 87, 93-96 (1989).

Further defendants claim that the hourly rate awarded was inappropriate for the amount of experience the plaintiffs' attorneys had. However, the district court was presented with affidavits verifying that the proposed hourly rate was consistent with some other practitioners. We affirm the award of attorneys' fees.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16634
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN,
Defendant-Appellant.

No. 90-16635
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN,
Defendant.

and

ARISTOCRAT HOTELS, INC.
Defendant-Appellant.

No. 90-16637
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN,
Defendant.

and

JOSEPH MAZZOLA
Defendant-Appellant.

No. 91-15457
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN;
JOSEPH MAZZOLA;
ARISTOCRAT HOTELS, INC.,
Defendants-Appellants.

No. 91-16152
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellants,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN;
JOSEPH P. MAZZOLA;
ARISTOCRAT HOTELS, INC.,
Defendants-Appellees.

BEFORE: CHAMBERS, TANG and PREGERSON Circuit Judges.

A majority of the panel has voted to deny the Appellants' Petition for Rehearing. Accordingly, the Petition for Rehearing is denied.

Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

(2)

No. 92-556

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1992

U.A. LOCAL 38 CONVALESCENT TRUST FUND, ESTATE OF JOSEPH P. MAZZOLA and ARISTOCRAT HOTELS, INC.,
Petitioners,

VS.

CAROLE BRADEN, JUANITA RAYMOS, CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly retained jurisdiction over the state law claims.

2. Whether the district court correctly awarded summary judgment to the plaintiffs on the issue of retaliation under the California Fair Employment and Housing Act.

3. Whether the district court correctly directed a verdict in favor of the plaintiffs on the issue of discrimination under the California Fair Employment and Housing Act.

4. Whether the jury's verdict was amply supported by trial evidence and the district court was correct to deny a motion for new trial.

5. Whether the district court's refusal to postpone the fee hearing to permit defendants to conduct discovery was well within its discretion.

6. Whether state law, not federal law, provides the standards for determining the amount of attorneys' fee awards under California's Fair Employment and Housing Act, Government Code Section §12965(b).

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No. 92-556

In The
Supreme Court of the United States

OCTOBER TERM, 1992

U.A. LOCAL 38 CONVALESCENT TRUST FUND, ESTATE OF JOSEPH P. MAZZOLA and ARISTOCRAT HOTELS, INC.,
Petitioners,

vs.

CAROLE BRADEN, JUANITA RAYMOS, CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The above-named respondents respectfully request this Court to deny the petition for writ of certiorari seeking review of the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit in this case entered on June 24, 1992.

JURISDICTION

The disposition of the United States Court of Appeals for the Ninth Circuit was entered on June 24, 1992, affirming in all respects the judgments of the District Court filed August 17, 1990 as well as the fee award for the underlying case filed on January 25, 1991. A petition for rehearing

was denied by a majority of a Court of Appeals panel on August 21, 1992.[1] Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. 1254(1). This case however, contains issues of state law, only which are not appropriate for review by this Court. This Court should therefore decline to exercise its jurisdiction.

STATEMENT OF THE CASE

Respondents are four women who had been employed as waitresses in the dining room of the Konocti Harbor Inn ("KHI") for an average of ten years each. The KHI is a resort complex located in rural Northern California that is owned and operated by petitioner Convalescent Trust Fund ("Trust Fund") of the U.A. Local 38 of the Plumbing and Pipefitting Industry ("Local 38").

Although the job performance of each of the respondents was unquestionably exemplary, each woman was informed by KHI management at the beginning of the 1986 season that due to a new all-male hiring policy in the dining room, the women could either work in the resort's coffee shop or bus tables for the newly hired male waiters. Three of the respondents reluctantly stayed on at KHI and worked in the coffee shop for considerably lower hourly wages and tips. Respondent Braden chose not to accept this substantial demotion and left her employment at the resort. In late 1986, all four women filed complaints alleging sex discrimination with the California Department of Fair Employment and Housing ("DFEH").[2]

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[1] Petitioners now urge this Court to review almost every issue contained in the decision of the Court of Appeals although in their Petition for Rehearing, they requested reconsideration of the attorneys fee issue only.

[2] Petitioners erroneously state that respondent Braden did not file a complaint with the DFEH in 1986 (Pet. Writ. p. 4). At trial Ms. Braden testified that she did so file but her complaint was misplaced by the agency and a 1987 date was mistakenly affixed to her replacement complaint. The district court judge heard this testimony and judged it as credible. At any rate, the agency issued Ms. Braden a right to sue letter which indicated that she had filed in a timely manner.

In March 1987, the Trust Fund and Aristocrat Hotels, Inc. ("Aristocrat") entered into a written contract for Aristocrat to manage and operate KHI through 1988. In early 1987 after the filing of their DFEH complaints, respondents Raymos, Brooks and Chrapowicz attempted to re-apply and return for work as they had done for the last several years. Although they each submitted applications on three separate occasions, they were told by Aristocrat staff that these applications were lost and then later rejected. Realizing the futility of re-applying for work at KHI, respondent Braden did not bother to do so.

As a result of negotiations with respondents' counsel in late 1988, Aristocrat offered to allow the women to return to their former jobs. Respondents Raymos and Chrapowicz, mistrusting of the offer, chose not to return. Respondents Brooks and Braden quit other work and did go back to work at KHI but found that they were given reduced table assignments and working hours. They were also, as were Raymos and Chrapowicz in 1987, generally treated in a hostile manner by management. Braden and Brooks worked until the beginning of the 1989 season when they were effectively forced out of their jobs by receiving so few and such undesirable table assignments.

After the DFEH proceedings failed to result in a settlement, respondents in November 1987 filed their complaint in California Superior Court for the County of Lake. Alleging the existence of federal jurisdiction based upon the Labor Management Relations Act (29 U.S.C. 185 (a)) because the respondents were members of a union which had negotiated a collective bargaining agreement with the employer, petitioners removed the case to United States District Court for the Northern District of California. Arguing for remand, respondents pointed out that their action was based primarily on state anti-discrimination law and interpretation of the collective bargaining agreement was not relevant to these proceedings. Petitioners opposed this remand motion which was denied by the district court.

Throughout the first year of litigation, respondents pared down their complaint until only causes of action for sex and age discrimination under the California Fair Employment and Housing Act (California Government Code §12940 *et seq.*) remained. During that first year, however, the district court heard and decided two of petitioners' motions to dismiss, respondents' motion to compel discovery and respondents' request for preliminary injunction, and it ordered two settlement conferences be held before U.S. Magistrates.

The district court litigation, which was vigorously and bitterly contested by petitioners, continued for another twenty months until trial. During that time, the involvement of the district court became even more extensive: it granted five further motions of respondents to compel discovery and awarded sanctions against petitioners' counsel on two occasions; it decided several issues related to establishment of a class which respondents proposed; it decided several summary judgment motions brought by all parties; it granted respondents permission to substitute the estate of Joseph P. Mazzola after that defendant died. It was not until the eve of trial at a pretrial conference that petitioners for the first time alleged that the district court did not properly have jurisdiction over this case.

In November 1989, the district court heard respondents' motion for partial summary judgment. As petitioners have stated to this Court, no opposition was filed and the motion was granted as to respondents' retaliation claim. The district court denied the motion, however as it pertained to respondents' sex discrimination claims, finding that disputed issues of fact still existed. Following the district court's decision on the summary judgment motions, petitioners submitted a proposed order which contained several pages of argument in support of a position that Aristocrat would not be liable for retaliation and that Carole Braden was not entitled to summary judgment for 1987, arguments which

had not been offered prior to the court's decision. Just before trial, petitioners attempted to re-litigate the entitlement of respondents to summary judgment for retaliatory non-hirings by filing three separate *in limine* motions. The district court denied all of those motions.

Trial began on June 6, 1990 and took sixteen whole or partial court days. All four of the respondents testified as to their extensive experience in tableside food preparation gained at premium restaurants where they had previously worked. They also testified that they were not asked about this experience by KHI management prior to being ousted from the dining room. Additionally, they testified to the fact that they were told by various KHI management personnel that Joseph P. Mazzola wanted to remove them from the dining room and replace them with male waiters. A former management employee also testified regarding Mazzola's instructions to replace the women.[3]

Two young men who were hired as waiters in the KHI dining room in 1986 and 1987 testified that they had very little experience waiting tables prior to that time and that the work that they performed in the dining room during those years required only minimal training. One of these men also testified that he had bussed tables for the respondents in prior years. Based upon all of this uncontested evidence, the district court directed a verdict in favor of respondents on the issue of sex discrimination.

Both in their brief before the Court of Appeals and in their petition before this Court, petitioners rely heavily upon their written response to the DFEH which "set forth the reasons why in management's opinion the 1986 dining room

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[3] Nothing in the record supports petitioners' contention that KHI management told the four women that "there was not enough time to train them in the new menu . . ." (Pet. Writ, p. 4).

waiters were better qualified than each of the plaintiffs to serve the 1986 menu." (Pet. Writ, p. 6). This trial exhibit which contained a glorified description of the 1986 KHI Italian dining room menu and service style and which claimed strict job requirements for the KHI dining room waitstaff, however, was only a self-serving explanation for the discriminatory policies which were instituted. No testimony was heard at trial which supported the assertions contained in the document; neither the unidentified author of the response nor the chefs or maitre d' appeared to testify. In support of their position that the plaintiffs were not qualified to work in the dining room in 1986, petitioners continue to rely on testimony which was never offered.

The jury awarded damages based upon the evidence which it heard at trial and the exhibits which it had on hand during its deliberations. Among those exhibits were documents known as payroll earnings registers which contained records of hours worked and tips reported by table waitpersons. The jury had heard evidence that in the restaurant industry waitpersons frequently underreport the total amount of tips earned. Indeed, the payroll earnings registers showed that several KHI waiters reported no tips for two week periods while they were fully employed. Additionally, Frank Sullivan, Trust Fund administrator testifying for petitioners explained that IRS allocated tip regulations require employers to record a minimum amount of tips earned; often these ascribed amounts are way below what employees really earn as tips. For those reasons, the jury calculated the lost wage damages which it reasonably thought the respondents were entitled. The jury also awarded damages for emotional distress and punitive damages against the Trust Fund.[4]

[4] The petitioners filed separate motions for new trial and motions for judgment notwithstanding the verdict arguing that the jury improperly enhanced the damage awards. Petitioners further argued before the Court of Appeals that the jury was guilty of misconduct in this regard. Those arguments were all rejected.

Following the judgment for plaintiffs on the merits, plaintiffs then moved for an award of reasonable attorneys' fees under the attorneys' fee provision in California's Fair Employment & Housing Act, California Government Code §12965(b). Their motion was supported by the detailed declarations of each of plaintiffs' two principal counsel, including sixty-nine (69) pages of detailed time summaries explaining every task for which compensation was being claimed. Defendants then filed their opposition to plaintiffs' motion, arguing, *inter alia,* that plaintiffs were not the prevailing parties, that they (defendants) were entitled to an offset for their attorneys' fees, that plaintiffs' hours and rates were too high, that plaintiffs' fee should be reduced by whatever contingent fee the plaintiffs had agreed to pay their attorneys, and that an enhancement was not appropriate. Then, a week after their opposition was filed and eight (8) days before the hearing, defendants served plaintiffs with deposition notices seeking to depose plaintiffs' attorneys and requesting the production of virtually every document in plaintiffs' attorneys' files. Plaintiffs then filed their reply.

The District Court heard extended argument on plaintiffs' fee motion. Following argument it ruled that plaintiffs were the prevailing parties. The court denied defendants' request to postpone the hearing and permit them to take discovery, finding that the case had been too prolonged and expensive already, that defendants would not be permitted to turn the fee proceedings into a "mini trial," and that the record before it was adequate to make the determinations required under the applicable standards, particularly because the trial court judge had observed the entire proceedings from start to finish. ER at 214.

The court also ruled that the specific terms of the contingency agreement between plaintiffs and their attorneys was irrelevant to its determination because those terms concerned the division of fees between plaintiffs and their

attorneys, while the court was concerned with an award from the defendants to plaintiffs. *Id.* at 214-215. The court also observed there had been "a lot of unnecessary stonewalling and hardball being played by the defense," and that the records presented by plaintiffs were adequate to establish the number of hours reasonably spent. The court awarded the plaintiffs a total of 2,000 hours for their work on the merits, constituting a reduction of twelve percent (12%) from the total hours claimed.

With respect to the enhancement, the court took into consideration a number of factors, including the contingent nature of plaintiffs' attorneys' fees, the nature of the case, the interests involved and the community interests to be served, as well as other factors mentioned by the defendants. It found, however, that the 2.0 enhancement requested by plaintiffs was too high for this case. Based on those factors, it reduced the enhancement to 1.75.

Following the court's decision and entry of a judgment reflecting its terms, the defendants moved jointly to alter or amend the judgment for attorneys' fees. That matter was heard on March 1, 1991 and was denied.

REASONS FOR DENYING THE PETITION

Petitioners have not raised any issues which justify review by this Court. Not one ground calls for the exercise of judicial discretion as envisioned by United States Supreme Court Rule 10.1. No conflict among the circuits nor any important federal questions are even remotely suggested. Rather, every aspect of this writ involves interpretation of California state law or a re-hashing of factual arguments that were rejected by the district court, jury and Court of Appeals.

Many years ago this Court succinctly stated, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). This Court has also expressed its reluctance to review cases which turn solely on state statutes. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). On both grounds, the instant petition should be denied.

1. The District Court Correctly Retained Pendent Jurisdiction Over the State Law Claims

Petitioners argue that the district court abused its discretion by retaining jurisdiction of respondents' state law claims after the last federal cause of action disappeared. As mentioned, petitioners who had removed the case originally did not raise the issue of possible improper jurisdiction until the eve of trial, after over two and a half years of active involvement of the district court. They now propose that some or all of this proceeding be re-heard by a state court despite conduct of a full jury trial in federal court.

Petitioners' reliance on *Lingle v. Norge*, 486 U.S. 399 (1988) is misplaced. (Pet. Writ, p. 6). For *Lingle* to apply, petitioners must assert that their own original removal of this case from state court based on Section 301 of the Labor Management Relations Act was improper. On the contrary, they insist on the propriety of the removal. Following this logic, the district court thus correctly acquired pendent jurisdiction over the state claims, and with it the discretion to remand or retain the case. *See Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986). Since the district court did in fact dispose of several motions and discovery disputes prior to the elimination of the federal claims and gained considerable familiarity with the case, there can be no abuse

of discretion on the part of the district court in having retained those claims.[5]

The propriety of the district court's retention of jurisdiction is further supported by the recently enacted Judicial Improvements Act of 1990 (28 USC 1367). This statute which codified pre-existing case law concerning theories of pendent jurisdiction adopted standards which limit the broad discretion of federal district courts to decline to exercise jurisdiction over pendent state law claims.

2. The District Court Correctly Awarded Summary Judgment to the Plaintiffs On the Issue of Retaliation Under the California Fair Employment and Housing Act

As stated, the trial judge granted partial summary judgment to respondents on the issue of retaliation because petitioners utterly failed to demonstrate the existence of any triable fact. As the Court of Appeals pointed out, nor did petitioners even attempt to argue that relevant facts remained to be discovered which might have changed the outcome of this motion. *See Harris v. Duty Free Shoppers, Ltd., Partnership,* 940 F.2d 1272, 1276 (9th Cir. 1991). (Pet. Writ., p. 5a).[6]

Despite the absence in the record of any trial evidence which may have defeated summary judgment if offered at

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[5] Petitioners argue that this Court's opinion in *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343 (1988) should "open the door to remandment." That case however, stands for the opposite principle that the district court has the discretion "to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness and comity which underlie the pendent jurisdiction doctrine." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. at 357.

[6] Petitioners have conceded that they failed to properly oppose respondents' motion for partial summary judgment when it was brought in the district court in November 1989. They also concede that they retaliated against Ms. Raymos, Ms. Chrapowicz and Ms. Brooks. (Pet. Writ, p. 6)

the time the motion was brought, petitioners now argue that pursuant to Federal Rule of Civil Procedure 54(b), the district court judge was obligated to revise this summary judgment order. (Pet. Writ, p. 12). This argument based on Fed.R.Civ.P. 54(b) was not raised by petitioners in either the district court or in the Court of Appeals. It is raised here for the first time and therefore should not be considered. Nevertheless, a trial court's decision to alter a non-dispositive ruling prior to the entry of a final judgment is, however, left to the discretion of the trial judge; nothing in this rule dictates that he or she must do so. *See, e.g., Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980).

In support of their contention that the grant of summary judgment was improper, petitioners have repeated their argument that respondent Carole Braden should not have been entitled to summary judgment on retaliation because she did not apply for work at KHI in 1987. At no stage of these proceedings have petitioners raised any evidence to show that Ms. Braden would have been treated any differently than the other three respondents who were refused work at KHI in 1987 had she re-applied during that year. Courts have consistently held that where it would be futile or where the employer had discouraged protected group members' applications, no application need be made. *See, e.g., Holsey v. Armour Co.*, 743 F.2d 199 (4th Cir. 1984) *cert. denied* 470 U.S. 1028 (1985).

3. The District Court Correctly Directed A Verdict In Favor of the Plaintiffs On the Issue of Discrimination Under the California Fair Employment and Housing Act

Petitioners request this Court to consider overturning the findings of fact of the district court and the Court of Appeals which resulted in an award of directed verdict on the issue of sex discrimination. In doing so, petitioners appear

to ignore the honored tradition of this Court to refrain from overturning the concurrent findings of fact of two lower federal courts unless such findings are shown to be clearly erroneous. *Neil v. Biggers*, 409 U.S. 188, 193 (1972).

At trial, respondents presented undisputed evidence of petitioners' 1986 adoption of a males-only hiring policy and of the minimal table service experience of two of the males hired to replace the women. All of the respondents testified as to their extensive restaurant experience which included tableside service. Moreover, it was undisputed that petitioners never even inquired if respondents had the requisite qualifications -- they simply demoted them because they were female. Petitioners presented no evidence which rebutted those qualifications or proved that the women were demoted for other than discriminatory reasons. Indeed, the jury found against the remaining defendant, Joseph P. Mazzola on the same issues -- retaliation and discrimination. As the Court of Appeals stated, directed verdict on this issue was granted because plaintiffs had established a prima facie case which the defendants did not adequately answer or rebut. (Pet. Writ, p. 6a).[7] There is no reason for this Court to review that factual determination.

4. The Jury's Verdict Was Amply Supported By Trial Evidence and the District Court Was Correct to Deny A Motion For New Trial

Petitioners next argue that evidence offered at trial was not sufficient to support the jury verdict for the plaintiffs and the district court should therefore have reduced the verdict or granted a new trial on damages. Petitioners

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[7] The jury awarded damages based on the trial court's summary judgment on retaliation and directed verdict on sex discrimination under California Government Code Sections §12940(a) and (f), respectively. The jury did not however, award double damages based on both theories of liability. The damages were therefore sustainable under either theory of liability.

baselessly maintain that "the jury was outside the evidence" when it calculated the plaintiffs' lost wage damages. (Pet. Writ, p.13). As set forth in the Statement of the Case herein however, the jury had before it the payroll earnings registers which enabled it to calculate the plaintiffs' lost wages based upon the reported and often underreported hours and tips of other KHI employees.[8]

The trial judge had ample opportunity to assess the rationality of the jury's damage awards. Since the trial judge is in the best position to evaluate the correctness of the jury's decision, this Court has traditionally given considerable deference to the conclusions of the trial judge in this regard. *See, e.g., United States v. Madrid,* 842 F.2d 1090, 1092 (9th Cir. 1988), *cert. denied,* 488 U.S. 912 (1988). Petitioners' argument that the district court committed reversible error in upholding the damage is therefore without merit.[9]

5. The District Court's Refusal To Postpone the Fee Hearing To Permit Defendants to Conduct Discovery Was Well Within Its Discretion

The question of whether and to what extent to permit discovery in attorneys' fee cases is a matter wisely left to

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[8] Petitioners' argument regarding the insufficiency of evidence to support the jury's verdict is further weakened by their failure to move for directed verdict on that issue at the close of all of the evidence. Under Fed.R.Civ.P. 50(b), such motion must be made in order to preserve the right to move for judgment notwithstanding the verdict and to preserve any appeal based on alleged insufficiency of the evidence. *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 786 F.2d 1342, 1345-47 (9th Cir. 1986). Though petitioners made various motions for directed verdict, none of these motions specifically alleged insufficiency of evidence.

[9] The district court explained its reasoning for denying defendants' new trial motions: "With respect to the damages I think the jury's damages awards were rational. We can always go back and reprogram the numbers and figure out how it might have been done differently... But I don't believe it's the plaintiffs' burden or the jury's burden or my burden to set forth the precise methodology that the jury used and to inspect that and determine whether their mathematics... were correct." E.R. at 173.

the sound discretion of the district court. *See, e.g., Malchman v. Davis*, 588 F.Supp. 1047 (S.D.N.Y. 1984), *aff'd as modified*, 761 F.2d 893 (2nd Cir. 1985), *cert. denied* 475 U.S. 1143 (1986). Such a rule is entirely consistent with this Court's admonition that attorneys' fee proceedings "should not result in a second major litigation." *Hensley v. Eckerhardt*, 461 U.S. 424, 437 (1983), *Webb v. Board of Education*, 471 U.S. 234, 244 n. 20 (1985).

Numerous courts have recognized that there is no right to discovery in attorneys' fee matters. *See, e.g., Malchman v. Davis, supra* (party opposing fee "failed to make cogent factual objections which indicate the need for discovery" and a "large record exists which is ample to permit decision on the relevant issues"); *Martinez v. Schock Transfer & Warehouse Co.*, 789 F.2d 848, 849-50 (10th Cir. 1986) (District Court did not abuse discretion in denying all discovery of fee issue where District Court found that "further discovery would not be of any substantial assistance in resolving this issue"); *Stewart v. County of Sonoma*, 634 F.Supp. 773, 776 (N.D. Cal. 1986) (defendant's request for further discovery denied because parties "have amassed an abundant record on this application" and court was thoroughly familiar with case). In *National Association of Concerned Veterans v. A Secretary of Defense*, 675 F.2d 1319, 1329 (D.C. Cir. 1982), the Court of Appeals emphasized that District Courts should have considerable control over discovery in attorneys' fee matters:

> "[I]t is not expected that fee contests should be resolved only after the type of searching discovery that is typical where issues on the merits are presented. The trial court retains substantial discretion based on its view of the submissions as a whole to guide any further inquiry . . . The sound administration of justice requires a balanced, informed approach to fee awards accomplished in reasonable time without turning such matters into a full trial."

a. The Plaintiffs' Original Time Records

In the instant case, the District Court refused to postpone its determination of plaintiffs' entitlement to fees on the basis of the defendants' belated -- it was filed six (6) days after their opposition was filed and only eight (8) days before the hearing on plaintiffs' fee motion -- requests for discovery. That request included the deposition of plaintiffs' two principal attorneys, which defendants estimated at two to three days each, and a broadly worded document request.

The ostensible purpose of this discovery was to examine the underlying documents on which plaintiffs' time records were based, for the main purpose of "checking their mathematical accuracy." The District Court, heeding this Court's admonition not to turn attorneys' fee litigation into "mini-trials," refused to postpone the hearing. It recognized that it had a full and complete record before it, that defendants had every opportunity to challenge any specific time entry claimed by plaintiffs' attorneys but had failed to do so,[10] and had every opportunity to present evidence as to the appropriate enhancement, but had failed to do so. Its decision was eminently correct.

b. The Precise Terms Of The Contingent Fee Agreement Between Plaintiffs And Their Attorneys

Petitioners also contend that the District Court should not have determined plaintiffs' fee without consideration of the specific terms of the particular

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[10] Plaintiffs' time records were detailed by date, task, and number of hours spent per task. If defendants had reason to doubt any particular time entry, they surely could have raised it in their Opposition. Yet, no such questions were raised.

Likewise, if what defendants mainly wanted was to check plaintiffs' "mathematical accuracy", that surely could be done from plaintiffs' time computations.

contingent fee agreement between the plaintiffs and their attorneys.

Petitioners' position is unsupportable. In *Blanchard v. Bergeron*, 489 U.S. 87 (1989), this Court did not hold, as Petitioners argued below, that a District Court "must" consider the terms of a contingent fee agreement in determining a reasonable fee. Rather, *Blanchard v. Bergeron* simply holds that "the presence of a pre-existing fee agreement may aid in determining reasonableness." 489 U.S. at 93 (emphasis added).

In *Venegas v. Mitchell*, 495 U.S. 82 (1990), however, this Court upheld an attorney's right to enforce a contingent fee agreement with his client that called for a fee larger than the statutory fee awarded by the court, concluding that "Section 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer, . . ." 495 U.S. at 90. This is precisely the reasoning utilized by the District Court below when it rejected defendants' argument that a fee determination could not be made without requiring the production of the plaintiffs' contingent fee agreement with their attorneys.[11]

In their heading, but not in their argument, petitioners claim that there is a split in the Circuits on this issue, citing *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985). However, whatever split there might once have been has been resolved by this Court's more recent decisions in *Blanchard v. Bergeron*, and *Venegas v. Mitchell, supra*.

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[11] As the district court stated: "What we are concerned with here is an adequate award of attorneys' fees to the plaintiffs from the defendants, not a question of how the money might be shared between the plaintiffs and their counsel." E.R. at 214: 22-25.

Finally, petitioners conclusively assert that any fee due to plaintiffs' attorneys under their contingent fee agreement with their clients should be deducted from the amount due from defendants. (Pet. Writ, p. 15.) However, even the one case petitioners cite in this section of their Petition, *Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 668-669 (3rd Cir. 1983), unequivocally rejects that argument. Speaking of the possible effects that plaintiffs' contingent fee agreement might have on the fee award, the court held that one thing it should not do is reduce the defendants' obligation to pay a reasonable fee award:

> "[Ordering the defendant to pay only the difference between the statutory award and the contingent fee] is an inequitable solution that would give a windfall to the defendant despite the finding of liability. Such a result would also frustrate the legislative policy objective that the fee itself serve as a disincentive to future discriminatory conduct." 719 F.2d at 669.

6. State Law, Not Federal Law, Provides The Standards For Determining The Amount of Attorneys' Fee Awards Under California's Fair Employment and Housing Act, Government Code §12965(b).

Respondents' attorneys' fees here were awarded under state law (pursuant to the California Fair Employment and Housing Act (FEHA), California Gov't Code §12965(b)), because on the merits, plaintiffs had prevailed on their pendent FEHA claim for relief. Petitioners argue, however, that the award of fees under state law must be reversed because of this Court's recent decision affecting federal attorneys' fee awards, *City of Burlington v. Dague*, 505 U.S. ___, 112 S.Ct. 2638 (1992).

Petitioners' argument defies both caselaw and logic. State law, not federal law, determines the amount of attorneys' fees awardable under state fee statutes in federal courts. As petitioners concede, determination of which law applies in pendent jurisdiction cases is the same as the determination of which law applies in diversity cases. *See* Pet. Rhg. at 5:17-20, citing 1A Moore's *Federal Practice*, pp. 3050-3051, 3419. *See, e.g., Kabatoff v. Safeco Ins. Co.*, 627 F.2d 207, 210 (9th Cir. 1980) (reviewing fee award premised on Oregon law on the basis of the factors that determine a reasonable attorneys' fee under Oregon law).[12]

The use of state law to determine the amount of attorneys' fees in pendent jurisdiction cases also makes perfect sense. This case was in federal court only because defendants removed it from state court, claiming that plaintiffs had inartfully pleaded a federal cause of action. Plaintiffs should have no lesser rights or remedies under FEHA than they would have had if defendants had not removed the case initially.

In the instant case, the district court's calculation of a reasonable attorneys' fee is perfectly consistent with California law. The California Supreme Court has expressly held that under state fee statutes, courts may augment or diminish the lodestar fee based on a number of different factors, including the contingent risk of not prevailing. In *Serrano v. Priest*, 20 Cal.3d 25, 49 (1977), the California

[12] While petitioners allege that there is a split of authority in the Circuits on this issue, in fact no such split exists. The split referred to in *Ackerman v. Western Elec. Co. Inc.*, 643 F.Supp. 836, 857 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988) is easily explained by distinguishing purely procedural issues (like timing of the motion, scope of discovery, need for a hearing, etc.), which are governed by federal law, from the substantive issues of entitlement to fees and the amount thereof, which are governed by state law because they are an integral part of the remedy provided by state law.

Moreover, because the Court of Appeals' decision here is an unpublished Memorandum, no conflict is created.

Supreme Court listed six non-exclusive factors that a court may consider in deciding whether to increase or decrease the lodestar figure. Those factors are:

> "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award; (4) whether the award would ultimately fall upon the taxpayers or would be borne by private individuals and enterprises; (5) whether the attorneys involved receive public and charitable funding for the purpose of bringing this kind of lawsuit and (6) whether the money awarded would inure to the benefit of a public interest organization, rather than the individual attorneys."

Subsequently, the state courts have applied this same rule in a variety of contexts. For example, in *Downey Cares v. Downey Community Development Comm.*, 196 Cal.App.3d 983, 995 (1987), the Court of Appeal cited to the Serrano factors in upholding a 1.5 multiplier under California Gov't Code §91003.

Most recently, in *Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1407 (1991), the Court of Appeal upheld a 1.5 multiplier awarded to plaintiffs' attorneys under a state fee statute, based on the need to attract competent counsel to take such cases on a contingent basis. 235 Cal.App.3d at 1418-19. On March 12 of this year, the California Supreme Court denied the bank's Petition for Review.

Here, the district court expressly considered several factors in determining the multiplier -- "the nature of the case and the interest involved and the community interest to be served, as well as certain of the other factors mentioned

by the defendants" (ER 218:1-6) -- which, at the time the award was made, were not permissible factors to use in determining a multiplier under federal law but were permissible factors under California law. *See City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78, 83 (1988).

This body of law is based on California legislation and policy, not the federal fee statues interpreted in *City of Burlington v. Dague*. In *Serrano v. Unruh*, 32 Cal.3d 621 (1982), the California Supreme Court expressly held that while federal private attorney general fee statutes have some precedential value, "[f]ederal decisions rest in part on evidence of congressional intent (citation) for which there is no California parallel. We envision an independent state rule." 32 Cal.3d at 639, n. 29. (Emphasis added.)[13]

In fact, the very argument petitioners raise here -- that "multipliers" under California law should be restricted in the same manner that they are restricted under federal law -- has been rejected on several occasions by California authorities. In *Downey Cares v. Downey Community Dev. Com'n, supra*, the appellant suggested that, in determining a reasonable fee under California Gov't Code §91003, the court should follow federal Supreme Court decisions were based on federal statutes and legislative history "for which there is no California parallel." 196 Cal.App.3d at 995. Instead, the court relied upon the "already well established" body of California law under §1021.5 and affirmed a 1.5 multiplier. *Ibid.*

[13] California law is based, at least in part, on federal decisional law that predates the United States Supreme Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). In *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal.3d 917, 934, (1979), the California Supreme Court held that "the legislature drew heavily upon the pre-*Alyeska* federal decisions, we believe that such authorities -- while no longer viable in the federal realm -- will often be helpful and reliable guides in interpreting the various provisions of the California statutes." *See also Serrano v. Unruh, supra*, 32 Cal.3d at 632 n. 14.

In *City of Oakland v. Oakland Raiders*, *supra*, the Court of Appeal upheld a 2.5 multiplier to the Alioto firm, petitioners' counsel here, despite the City's argument that under federal Supreme Court cases, most of the factors on which the multiplier was based were already included in the lodestar. The Court of Appeal noted that California's independent body of attorneys' fee law "mandated" the consideration of such factors over and above the lodestar figures. 203 Cal.App.3d at 84 n.5.[14]

The California caselaw is clear. Petitioners seek redress in the wrong forum:

> "[T]he duty of the federal court is to ascertain and apply the existing California law, not to predict that California may change its law and then to apply the federal court's notion of what that change might or ought to be. The proper fora in which to seek to change California law are the California legislature and the California courts, not the federal courts." (Footnotes omitted.)

Klingebiel v. Lockheed Aircraft Corp., 494 F.2d 345, 346 (9th Cir. 1974).

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[14] The California Fair Employment and Housing Commission (FEHC), the state agency charged with enforcing and interpreting the Fair Employment and Housing Act, has expressly held that state law, not federal law, governs fee awards under #12965(b). *Matter of Louis Cairo*, No. 84-04, FEHC Precedential Decisions CEB 3 (1984).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 92-556

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

U.A. LOCAL 38 CONVALESCENT TRUST FUND,
ESTATE OF JOSEPH P. MAZZOLA and
ARISTOCRAT HOTELS, INC.,
Petitioners,

v.

CAROL BRADEN, JUANITA RAYMOS,
CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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---

PETITIONERS' REPLY BRIEF

May it please the Court,

1. Pendent Jurisdiction

The docket entries in this case indicate that plaintiffs settled their claims with Local 18 on or before October 19, 1988 (Docket Entries, No. 96). That is the date the last federal claim was eliminated from this case. Thereafter, the only claims litigated in this case were claims among California citizens under the California Fair Employment and Housing Act.

Plaintiffs did not file their motion for order certifying a class until March 10, 1989 (Dkt. No. 116). Plaintiffs' summary judgment motions were not filed until October 16, 1989, about a year after plaintiffs had settled with Local 18. In other words, the District Court's retention of subject matter jurisdiction in this case cannot be justified by a substantial investment of the trial court's time in the case prior to dismissal of the federal claims.

All the federal claims were voluntarily dismissed. All are now res judicata.

Throughout the proceedings, even to the filing of pretrial statements, plaintiffs Braden et al. contended the trial court lacked subject matter jurisdiction. On subject matter jurisdiction in plaintiffs' Pretrial Statement it was said: "Plaintiffs have contested the jurisdiction of this Court from the time this case was first removed from the Superior Court of the County of Lake by predecessor defense counsel . . . Plaintiffs still dispute that this Court has jurisdiction of this case." Plaintiffs Pretrial Statement, May 4, 1990, pp. 2-3.

Any estoppel of these defendants to urge a remand to state court and any unfairness to the judgment winners disappear if on appeal in the case the Court finds reversible error requiring a complete new trial. Also, *United Mine Workers vs. Gibbs,* 383 U.S. 322, 86 S.Ct. 1130 (1966) and *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343 (1988) both suggest the District Court should on its own remand or dismiss actions which belong in state court.

Since at least *Textile Workers vs. Lincoln Mills,* 353 U.S. 448, 775 Ct. 912 (1957) this Court has attempted to harmonize state and federal judicial jurisdiction in cases involving labor relations and employment. *Lingle v. Norge* 486 U.S. 399, 108 S.Ct. 1877 (1988) is an attempt to leave to the state courts labor relations cases as to which there is no federal preemption policy or rule. The case at bar is such a case.

This Court should reverse plaintiffs' judgments and remand this case to state court.

2. Summary Judgment of Retaliation in Favor of Carole Braden and Wanda Brooks.

Carole Braden did not file a complaint with the California Department of Fair Employment and Housing in 1986. In the original November 17, 1987 complaint in this case it is alleged at page 15: "On or about June 17, 1986, plaintiffs Raymos, Brooks, and Chrapowicz filed timely charges of sex discrimination with the California DFEH and the Equal Employment Opportunity Commission regarding the acts and practices of defendants alleged herein. Due to the fact that her initial pre-complaint questionnaire was lost, plaintiff Braden filed her complaint on or about September 17, 1987." This allegation is consistent with the fact that neither the agency, nor the employer, nor Braden had a copy of any 1986 complaint by Braden.

After Konocti announced the 1986 Italian cuisine program, and informed Braden and the other plaintiffs they could not work full time in the dining room, Braden left Konocti on May 17, 1986 and worked for two years at a Lake County Restaurant called Oakes Corral.

Braden did not reapply for work at Konocti in 1987.

In their November 7, 1989 Opposition to Summary Judgment at page 6, these Petitioners admitted plaintiffs' statement that all plaintiffs except Braden reapplied for work at Konocti in 1987. At the hearing on the motion (November 17, 1987, p. 12), Petitioners advised the Court that Braden had not reapplied in 1987. Nevertheless, the trial court determined on summary judgment, and instructed the jury to find, that defendants had illegally retaliated against Carole Braden in 1987. Petitioners made several pre-verdict attempts to rectify this matter, all unsuccessful. Any directed verdicts or summary judgment on retaliation against Braden in 1987 should have been in favor of Petitioners, not Braden.

On the November, 1989 summary judgment motion, defendants' response noted the deposition testimony of Marjorie Wright, who was Braden's and Brook's supervisor, and who had testified that Braden and Brooks had worked full time in 1988 (Dkt No. 155, p.7). For this reason Braden and Brooks were not entitled to summary judgment on the multifarious issue of retaliation in 1988 and 1989.

3. 1986 Discrimination

On summary judgment on 1986 discrimination Judge Legge denied plaintiffs' motion. Citing *McDonnell Douglas* by name, the Court stated (no attempt is made to correct the reporter's errors):

> "The defendant has made a showing of disputed facts. Now, the argument becomes a question of whether the factual contentions are or are not credible, but that is not something that I can't resolve on summary judgment motion. The defendant has made a showing which if believed — if believed, could establish a defense to the four elements of the McDonald Douglas analysis.
>
> "There is a factual dispute really on the core issue, that is the key issue here of whether they were rejected from employment because of gender, or they were rejected for employment because of bona fide occupational qualifications. Now the argument is made that all this was professional but maybe it was, but I just cannot establish that on summary judgment." (Hearing of November 17, 1989, pp. 6-7).

Petitioners had opposed the motion on the basis of the Ted Hudson deposition. Hudson was a Konocti dining room waiter in 1985, 1986 and 1987. He testified that two years' prior experience in Italian cuisine tableside service was the objective requirement for serving the 1986 menu. Hudson's testimony, as well as Exhibit 15, which sets forth Konocti's reasons for not hiring any of the plaintiffs as full time dining room waitresses in 1986, were delivered to this Court in a 48 page Evidentiary Appendix on October 21, 1992.

Judge Legge properly noted that the California Courts have adopted the *McDonnell Douglas* rule, in cases under the California Fair Employment and Housing Act and other employment discrimination cases. See California cases cited in *Stephens v. Coldwell Banker*, 199 Cal.App.3d 1394, 1400 (1988).

Viewing the evidence in the light most favorable to Petitioners, there can be no doubt that there are in this case issues for the jury on two sub-parts of the plaintiffs' burden under *McDonnell Douglas*. They are: (1) whether plaintiffs were qualified to do the work in question and (2) whether plaintiffs were as qualified for that work as the persons who were hired to do it. The jury did not have to find for Petitioners on these issues, but it reasonably could have.

In 1986 after some of the Italians had left Konocti, management hired David Johnson as a waiter in the dining room. Johnson had once been a busboy for some of the plaintiffs. Johnson, already an aeronautical engineer by the time of trial, attempted to testify favorably to plaintiffs, saying that he obtained the 1986 dining room waitering job just by asking, without any special training. However, on cross-examination of Johnson, evidence was elicited that he had worked for two years as a waiter at an Italian

restaurant in Marin County, Marin Joe's. This appeared on Johnson's employment application to Konocti. He thus satisfied the objective requirement of prior experience in an Italian restaurant (Ex 15, p.6), which all the other 1986 waiters met.

Ronald Hudson, Ted's son, worked in the dining room in 1986 as a bus boy, not a waiter. He had bussed dishes for plaintiffs. At his father's request to the maitre'd, Ronald was permitted to work as a waiter for about a week, before quitting Konocti.

Alleged admissions of Konocti personnel, to the effect that women were to be excluded from the dining room in 1986, presented credibility issues which should be resolved in Petitioners' favor on directed verdict. *Anderson v. Liberty Lohby Inc.*, 477 U.S. 255, 106 S.Ct. 2505; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598.

Petitioners won the class action allegations of this case by showing that women were well represented in all departments of Konocti. This too is evidence in Petitioners' favor on the issue of 1986 dining room discrimination.

The jury found that Joseph Mazzola was guilty of discrimination in the matter of the 1986 dining room policy. The trial Court instructed the jury to find that the policy was illegal, and asked the jury to find whether Mazzola had participated in it. The Court instructed as follows (Proceedings of July 16, 1990, p. 13):

> "All right. Now, the first charge that the plaintiffs make here is one of sex discrimination. As you will see in the verdict form, I have found and you will find this in question No. 1, that as a matter of law, the Defendants Convalescent Trust Fund and Aristocrat Hotels did discriminate against the four named plaintiffs on the basis of their sex.
>
> "That question is eliminated from your consideration. The question you will have to decide with respect to gender discrimination is whether the defendant Joseph Mazzola also discriminated against the named plaintiffs in violation of California Law.
>
> "So, that is your one decision with respect to finding of liability on gender discrimination, and that is, whether Joseph Mazzola was responsible for it."

It is a bootstrap argument to say that the finding against Mazzola is a finding that the 1986 program is discriminatory. The Court having instructed the jury that the program was discriminatory, the finding against Mazzola can be nothing more than a finding that Mazzola supported the program, which Petitioners have never denied.

All Petitioners are entitled to a new trial on the central issue of 1986 sex discrimination.

4. Excessive Damages

Plaintiffs assert that the damages of lost wages awarded by the jury are supportable under either the 1986 discrimination finding or the 1987 retaliation finding. Respondents' Brief, fn. 7. That is not the case.

On Petitioners' new trial motion, plaintiffs, having interviewed the jury, told the Court:

> "When plaintiffs inquired, the jury informed them that they did not rely on either defendants' or plaintiffs' calculations, but chose to make their own. The calculations were made using the earnings of the highest paid dining room table server in 1986 and 1987 as a base entitlement salary for each of the four plaintiffs, and for 1988 and 1989 for plaintiffs Brooks and Braden. To this they added 15% of the KHI dining room's gross revenue in each year, distributed in various percentages to the various plaintiffs based on the jury's conclusions as to what percentage of total possible tips each plaintiff would have been able to earn had they been allowed to work without the discriminatory impact they suffered in each applicable year. The 15% of gross dining room revenue was added because it was the opinion of the jury that *all* food servers underreport their tips, but that this had no bearing on the right to be compensated for their loss. Thereafter, they deducted all monies actually earned by each plaintiff by way of mitigation." Dkt. No. 329, p.13.

Here we have alleged consecutive violations occurring not simultaneously but over consecutive time periods -- 1986, 1987, 1988, and 1989. Damages were calculated for each year and were then added together. If liability is absent in one or more years, damages must be reduced.

Also, Respondents state that hourly wage rates were lower in the coffee shop than in the dining room (Brief, p. 2). However, Juanita Raymos testified before the jury (June 7, 1990 p. 300):

"Q. Now, you testified that you worked under the Collective Bargaining Agreement between Konocti Harbor Inn and Local 18.

"A. Yes, I did.

"Q. In that, it sets forth what the hourly wages would be?

"A. Yes.

"Q. In 1985 and '86 was there any difference in the hourly pay between a dining room waitress and a coffee shop waitress?

"A. No. That's waitresses as far as your pay goes.

"Q. Is it the same whether you're working in the coffee shop or the dining room?

"A. I believe so." (June 7, 1990, pgs. 300-301).

In fact, it is the same. The Collective Bargaining Agreement is in evidence (Refs. Ex 28, p. 10). It shows the hourly wage rate for eight hours of straight time for waiters, waitresses, carhops and bus persons to be $33.78 in 1986. The Italian waiters of course received the same hourly wage as the plaintiffs.

It is pertinent to show some representative earnings in 1986, coffee shop versus dining room.

		Hours Worked
Ted Hudson	$8,698.86	889.5
Oscar Miglioli	8,202.52	862.5
Juanita Raymos	8,453.44	883.
Christine Chrapowicz	8,271.78	1,031.75
Wanda Brooks	7,435.66	805.5
Carole Braden	8,847.00	1,157
Corrado Di Pietro	5,716.91	549.5

Defs. Ex. 20. These figures include wages and reported tips.

Hudson, Miglioli and Di Pietro worked in the Konocti dining room. Raymos, Chrapowicz and Brooks worked in the Konocti coffee shop. Braden worked for a short time at Konocti Harbor Inn, and then for most of the season (ie. after May 17, 1986) at a Lake County restaurant called Oakes Corral.

5. Attorney Fees.

A. Discovery of Plaintiffs' Attorneys' Original Time Records.

Plaintiffs insist on referring to their hours summaries as "records" (Brief, p. 15). At the hearing on attorney fees, the trial court asked plaintiffs' counsel: "Well, those summaries are not contemporaneous records, are they?" Counsel, Mr. Pearl, responded: "No. Some are not contemporaneous, and I won't deny that". Hearing of December 14, 1990, p. 16. A copy of that hearing transcript was delivered to this Court on or about September 30, 1992.

No contemporaneous time records were produced. The original contemporaneous records were prepared before plaintiffs knew that hours devoted to the class action would not be compensable; the summaries were prepared after the class action judgment was entered against plaintiffs, indeed after plaintiffs had decided not to appeal the adverse judgment on the class action. The problem with the summaries is that the Court and opposing counsel are told only what plaintiffs' counsel, with full knowledge of what is compensable and what is not, are willing to tell. This is not an

acceptable way of arriving at a substantial judgment for attorney fees. Under the hearsay rule, the summaries are not even admissible, Federal Rules of Evidence 1006, although the original records may be under Federal Rules of Evidence 803(6).

5. Attorney Fees

B. Discovery of the Fee Agreement.

Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985) and *Sullivan v. Crown Paper Board Co.,* 719 F.2d 667 (3rd Cir. 1983) suggest there are at least three ways a trial court might deal with a contingency fee agreement on a fee-setting motion:

1. The Court might reduce the appropriate court-awarded fee, the lodestar, by the amount of the contingent fee;

2. The Court might award the full lodestar but require the plaintiffs' lawyer to waive the contingent fee up to the amount of the lodestar, requiring the client to pay the lawyer the amount by which the contingent fee exceeds the lodestar;

3. The Court might award the full lodestar to the plaintiff and make no ruling concerning the contingent fee. Our case falls into the third category. The cases cited in *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) indicate that the Circuits use all three methods. There ought to be a uniform rule on the subject.

The second method appears to be the rule most widely used. What is pernicious about that rule is that it makes a new contract for the plaintiff and his lawyer. Such action unnecessarily involves the Court in the relations of the lawyer and his client and creates adversarial tension between lawyer and client where before there was none. See *Vanegas v. Mitchell* 495 U.S. 82 (1990).

The problem with the third category, in which the Court ignores the fee agreement, sets the lodestar fee and awards it, is that the attorney may wind up with the contingent fee and the court-awarded fee. Defining the lodestar as a reasonable fee, the attorney receives more than a reasonable fee under this method, and somebody's resources, either the client's or the defendant's, have been wasted.

This Court's opinion in *Vanegas vs. Mitchell*, 495 U.S. 82 (1990) seems to favor the first alternative, whereby the lodestar is reduced by the amount of the contingent fee. In *Vanegas*, this Court enforced the fee agreement.

The fee agreement should affect the lodestar. It is also clear that the fee agreement should affect any possible enhancement of the lodestar. This Court has stated that the fee agreement may have a bearing on the question of enhancement of the lodestar, since the lawyer may have offset the risk of loss by negotiating a contingency which, if it materializes, would produce compensa-

tion greater than the prospective lodestar amount. *Pennsylvania v. Delaware Valley Citizens Council*, 483 U.S. 711, 107 S.Ct. 3078, 3099 (1987). See also Justice Blackmun's statement in *Dague,* supra, 112 S.Ct at p. 2645: "I indicated that if . . . the attorney and client have been able to mitigate the risk of non-payment . . . by agreeing to a contingent share of a substantial damage recovery . . . to that extent enhancement should be unavailable."

The fee agreement may affect the amount of the lodestar and the amount of the enhancement. The decisions of both lower Courts, that the fee agreement may properly be ignored in setting statutory fees, are in error. (In California all contingent fee agreements must be in writing. California Business and Professions Code 6147) The Court should grant the writ, vacate the fee award, and direct the trial court to require production of all fee agreements in this case.

6. Application of *City of Burlington v. Dague* ____ U.S.____, 112 S.Ct. 2638 (1992).

Respondents have not distinguished Judge Schwarzer's opinion in *Ackerman v. Western Electric Co.* 643 F. Supp. 836 (N.D. Ca. 1986), aff'd 860 F.2D 1514 (9th Cir. 1988). There, at 643 F.Supp at p. 868, the trial court followed *Blum v. Stenson* 465 U.S. 886 (1986) and not the precedent of the California Fair Employment and Housing Commission in the matter of enhancement, the Court declining any enhancement. The Ninth Circuit affirmed the District Court's decision in *Ackerman,* without deciding whether federal or state law governs the computation of attorney fees under Calif. Gov't Code 12965(b) for services rendered in a case in federal court. The Ninth Circuit concluded in footnote 5 that there was no significant difference in 1988 between state and federal law in the matter of calculation of attorney fees under a fee-shifting statute. 860 F.2d p. 1520.

Given *Dague,* there is now such a difference. Federal courts applying federal fee shifting statutes may not in general enhance the lodestar. California courts applying California statutes have discretion to make an enhancement. There is certainly not in California any ironclad right to enhancement, as Respondents seem to suggest.

Dague is a rule of procedure which ought to apply in federal court in all fee-settings, whether the right to fees arises from a federal statute, a state statute, a local ordinance, a contractual provision, or common law rules such as quantum meruit. A lawyer practicing in federal court is an officer of the federal court. The amount of his or her compensation ought to be governed by the federal law.

In ordering the $255,000 enhancement, Judge Legge expressly relied on *Fadle v. City & County of San Francisco* 859 F.2d 649 (9th Cir. 1988) and the concurring opinion in *Pennsylvania v. Delaware Valley Citizens Council ("Delaware Valley II")* 483 U.S. 711 (1987). See December 14, 1990 hearing transcript p. 23. The said transcript was delivered to this Court with undersigned's letter of September 30, 1992.

Because the Ninth Circuit did not address the implications of *Dague*, and because Judge Legge did not have the benefit of that decision when he set the fees in this case, the enhancement issue in this case should be remanded to Judge Legge for reconsideration in the light of *Dague* even if the Court determines that *Dague* does not preclude enhancement in federal court under state fee-shifting statutes. Judge Legge may exercise his discretion differently in the light of *Dague*.

7. Conclusion.

Let us assume that, under their contract with plaintiffs, counsel are entitled to one-third of the damage recovery of $311,949. Presently under submission to the Ninth Circuit is Respondents' motion for attorney fees on appeal, in the amount of $148,000. Should the Ninth Circuit and Judge Legge grant fees on appeal in that amount, the attorney fees and costs in this case will be as follows:

1.	Contingent fee	$104,000
2.	Lodestar (2000 hours times $170)	340,000
3.	Enhancement	255,000
4.	Fees for fee applications	16,200
5.	Costs	8,500
6.	Fees on appeal	148,000
7.	Interest on fees and costs of $619,700 from December 14, 1990—approximate	60,000
	Total fees and costs	$931,700

The four plaintiffs will have recovered $208,000, about $52,000 each. The class has recovered nothing. No injunctive or declaratory relief was granted in this case. As we have seen, the lost wages damage judgments of the plaintiffs are excessive.

A result such as this does not happen without legal error. The enhancement should be eliminated. The hours should be reduced by about half to account for loss of the class action. Lawyers of only 4 and 9 years' experience should receive an hourly rate closer to $100 than $170. When the lodestar has been properly set, it

should be reduced by the amount of the contingent fee. There should be no fees on appeal.

Petitioners respectfully pray that the writ of certiorari be granted, and that this Court grant Petitioners a new trial of the 1986 discrimination charges and all damage issues in the case. Petitioners are entitled to a new trial of the lost wages damages, and the emotional distress and punitive damage if any should be set at the same time as lost wages damages, *Kuffel v. Seaside Oil Co.* 11 Cal App. 3d 354, 367 (1970).

Petitioners should have a new trial of Braden's charges of 1987 retaliation, and of Braden's and Brook's charges of retaliation in 1988 and 1989. The trial court erroneously granted summary judgment and a directed verdict on these retaliation issues.

The fee award should be summarily reversed and remanded to the District Court with instructions to require production of all fee agreements pertaining to this case and all original time records of plaintiffs counsel, and to permit reasonable cross-examination of those documents. This Court should hold that *Dague* precludes enhancement of attorney fee awards in federal court.

Respectfully submitted

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